No. 90-644

Supreme Court, U.S.
FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

JAMES G. LEDBETTER, COMMISSIONER
GEORGIA DEPARTMENT OF HUMAN RESOURCES,
Petitioner,

v.

MARTA O. TURNER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATES OF MINNESOTA, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, NEBRASKA, NEW JERSEY, NEVADA, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI STATES

The *amici* states file this brief with the Court because the Eleventh Circuit's decision in this case contradicts the express will of Congress regarding the Aid to Families with Dependent Children ("AFDC") program and has severe consequences for the administration of the AFDC program by the states. The *amici* states request that this court grant certiorari and reverse the circuit court's decision.[1]

AFDC is a federal-state public assistance program established under Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-15 (1988). The program provides financial assistance and other services to needy children and the parents or relatives with whom they live. *Id.* at § 601.

The AFDC program is based on a scheme of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). States which choose to participate in this optional program receive matching federal funds for payments made to needy children and families. Participating states are required to administer their AFDC programs in compliance with federal statutes and regulations promulgated by the Secretary of the federal Department of Health and Human Services ("Secretary" or "HHS"). *Id.*; 42 U.S.C. §§ 601, 602 and 604. The *amici* states, and indeed all states, have opted to participate in the AFDC program and are consequently obligated to comply with applicable federal statutes and regulations in the administration of the program.

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[1] The *amici* states, including the District of Columbia, file this brief *amicus curiae* pursuant to Supreme Court Rule 37.5 which provides for filing such a brief without consent of the parties.

The *amici* states present this brief in support of the Petition for Writ of Certiorari filed by Georgia's Commissioner of Human Resources. Georgia seeks review of the Eleventh Circuit's holding that, if a state fails to provide a recipient adequate notice of termination of benefits, the state may not recoup past AFDC payments even though the family was ineligible to receive the payments under federal law. This decision is clearly wrong. It confuses two distinct concepts—eligibility for benefits and the procedure for termination of benefit payments. It provides advocates a means of blocking the implementation of federal statutory changes by challenging the adequacy of state notices so that the recipients may permanently retain benefits for which they are indisputably not eligible. It weakens public respect for welfare programs by allowing non-needy persons to receive benefits on the basis of "procedural errors." It directly impacts the fiscs of the federal and state governments by requiring that scarce public welfare funds be spent to provide AFDC benefits to persons whom Congress itself declared ineligible. Moreover, as explained below, one of the *amici* states, California, has a case now pending before the Ninth Circuit which raises an issue similar to that raised here.[2]

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[2] Georgia also seeks review on a second question, whether the Eleventh Amendment precludes a federal court from enjoining state recovery of past overpayments. This *amicus curiae* brief addresses only the first, "overpayment," issue.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION, THAT RECIPIENTS MAY RETAIN BENEFIT PAYMENTS TO WHICH THEY WERE NOT ENTITLED UNDER AFDC ELIGIBILITY STATUTES, CONFLICTS WITH THE PRINCIPLES OF DECISIONS OF AT LEAST ONE OTHER CIRCUIT COURT AS WELL AS THE OPINION OF THREE JUSTICES OF THIS COURT.

The overpayments in this case resulted from the application of the AFDC "lump-sum" statute. The lump-sum statute was one of many amendments to the AFDC eligibility laws adopted by Congress in the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, 95 Stat. 357 (1982). The lump-sum statute, 42 U.S.C. § 602(a)(17), provides essentially that a family which receives an amount of nonrecurring lump-sum income is ineligible for AFDC benefits for the number of months that the income would satisfy the family's standard of need. The "eligibility" language of the statute states:

> [T]he family . . . *shall be ineligible for aid under the plan for the whole number of months* that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family . . . .

Id. (emphasis added). Thus, the lump-sum statute specifies a statutory "period of ineligibility" which results from an AFDC family receiving a lump-sum payment.

The Secretary's implementing regulation specifies when the period of ineligibility begins: "The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month."

45 C.F.R. § 233.20(a)(3)(ii)(F) (1989).[3] Therefore, the fact of ineligibility, the length of the ineligibility period, and when the ineligibility period must occur, are all dictated by federal law.

The 1981 OBRA amendments not only made persons who received lump-sum payments ineligible for AFDC benefits for certain periods, those amendments also required that a state agency must recoup all "overpayments" made to recipients. 42 U.S.C. § 602(a)(22). Under the Secretary's regulations, an overpayment "means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible." 45 C.F.R. § 233.20(a)(13)(i) (1989). Overpayments are recouped from persons who are current AFDC recipients by withholding small amounts from current AFDC payments.[4] Since a recipient who receives a lump-sum amount greater than AFDC income limits is ineligible for AFDC for a specified period, any benefits paid during that period constitute overpayments and must be recouped.

In the instant case, the plaintiff recipients received lump-sum payments and consequently were ineligible for fixed periods of time under federal law. The State of Georgia issued termination notices to the recipients in order to halt AFDC benefits during the remainder of the recipients' periods of

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[3] For administrative purposes, the payment month corresponding to a "budget month" may be the budget month or one of the following two months. 45 C.F.R. §§ 233.31-.32 (1989).

[4] Under section 602(a)(22)(A), no more than 10% of the current monthly payment may be withheld to recoup an overpayment. Many states have chosen to recoup overpayments from current recipients at even slower rates. In Minnesota, for example, recoupment of an overpayment based upon an administrative error may not exceed 1% of the current monthly payment. *See* Minn. Stat. § 256.73, subd. 8(b) (1990).

ineligibility.[5] Some of the recipients appealed the proposed terminations and chose to continue receiving benefits pending resolution of their appeals. *See* 45 C.F.R. § 205.10(a)(6)(i) (1989). The district court found that the termination notices were inadequate, *i.e.*, that they failed to meet the requirements of federal regulations for such notices. Pet. App. A40-A41. Because the notices were inadequate, the district court enjoined the state from recouping AFDC payments made to recipients during their statutory periods of ineligibility. Pet. App. A14, A28-A29. On appeal, the Eleventh Circuit affirmed this decision saying, "Because the state did not terminate the recipients in accordance with federal notice requirements, the recipients' entitlement to aid was not affected. Consequently, they did not receive an overpayment." Pet. App. A7.

The Eleventh Circuit's decision is clearly contrary to the federal lump-sum and overpayment statutes. The circuit court held that recipients' entitlement to assistance was not affected because termination notices were inadequate. Federal law does not base entitlement to AFDC on adequacy or inadequacy of termination notices. Rather, the statute provides that a family which receives lump-sum income "shall be ineligible" for a fixed period. 42 U.S.C. § 602(a)(17). Moreover, federal law requires a state to recoup any overpayment, 42 U.S.C. § 602(a)(22), and states that an overpayment is a payment "which exceeds the amount for which that unit was eligible." 45 C.F.R. § 233.20(a)(13)(i). Thus, the recipients in this case clearly received overpayments (amounts greater than they were eligible to receive) and the amounts were subject to recoupment.

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[5] The court of appeals' statement that recipients received termination notices *after* their terminations, Pet. App. A3, is apparently erroneous. The district court correctly noted that recipients received notices that their benefits "would be terminated." Pet. App. A40.

It must be recognized that the principle of the Eleventh Circuit's decision is not limited to ineligibility based upon the lump-sum statute, but instead would apply to ineligibility based upon almost all of the eligibility provisions of federal and state law. Moreover, the circuit court's holding, that there cannot be an overpayment for a period prior to a valid termination (or reduction) notice, fundamentally misperceives the relationship between eligibility and notice of termination or reduction. An applicant or recipient is eligible or ineligible for AFDC benefits by operation of the eligibility statutes and regulations. Any amount received by a recipient which exceeds the amount for which that person was eligible is an overpayment. The termination or reduction notice is merely the procedural device used to actually stop or reduce the current payment of benefits.[6]

Notice and opportunity for hearing prior to discontinuation of public assistance benefits is required by federal regulation, 45 C.F.R. § 205.10(a)(6)(i) (1989), and by due process. *Goldberg v. Kelly*, 397 U.S. 254 (1970). The reason for this requirement is to protect a recipient's right not to have public assistance benefits *erroneously* reduced or terminated. *Id.* However, it has never been suggested that the requirement of notice and an opportunity for hearing before terminating benefits was intended to allow recipients to retain benefits to which they were not entitled under eligibility rules. Instead, where a person receives benefits pending notice and oppor-

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[6] Termination or reduction notices and overpayments are related to this extent: Where the state proposes to reduce a recipient's grant by a small amount to recoup a past overpayment, the recipient is entitled to receive notice and opportunity to appeal *that* reduction. Thus, the recipient may appeal the correctness of the overpayment determination.

tunity for hearing, the benefits paid are ultimately subject to recovery if it is determined that the recipient was not eligible to receive them. This is specifically provided by federal regulations, 45 C.F.R. §§ 205.10(a)(6) and 233.20(a)(13)(i) (1989), and was explicitly acknowledged by this Court in *Goldberg*, 397 U.S. at 266. *See also Edelman v. Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., circuit justice, granting stay).

Judicial remedies may be appropriate where a state has provided inadequate termination or reduction notices. In appropriate cases, benefits may be judicially reinstated pending proper notice of termination or reduction and opportunity to appeal from that action. *Cf. Foggs v. Block*, 722 F.2d 933 (1st Cir. 1983), *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985) (court rejected reinstatement of benefits remedy where possibility of erroneous termination or reduction was low). However, these remedies have nothing to do with allowing recipients to keep benefits for which they were not eligible.

The Eleventh Circuit's decision conflicts—in principle if not directly—with two decisions of the Ninth Circuit and a concurring/dissenting opinion by three justices of this Court. *See Medberry v. Hegstrom*, 786 F.2d 1389 (9th Cir. 1986); *Turner v. McMahon*, 830 F.2d 1003 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988); *Gardebring v. Jenkins*, 485 U.S. 415 (O'Connor, J., concurring in part and dissenting in part).

In *Medberry*, the state had a policy of not beginning a lump-sum period of ineligibility until *after* the resolution of any recipient appeal of the proposed termination. Recipients challenged this policy in federal court, contending that the federal lump-sum regulation required that the period of ineligibility must begin immediately after receipt of the lump-sum, and

not at a later time. They argued that any AFDC payments received during months that the family was ineligible for AFDC (while the family appealed the termination) should be treated as overpayments. 786 F.2d at 1390. The Ninth Circuit requested an amicus brief from the Secretary giving her interpretation of the applicable federal regulation. In her brief, the Secretary told the court that she interpreted her regulation (45 C.F.R. § 233.20(a)(3)(ii)(F))

> to require that, when an AFDC family receives lump sum income, the period of ineligibility must begin no later than the corresponding payment month *irrespective* of the month of discovery of the receipt of lump-sum income or *of any procedural delays in terminating benefits*, such as a request for a fair hearing. *If the family receives benefits during any month of the ineligibility period, they are considered to be overpayments* that must be recovered in accordance with section 402(a)(22) of the Act, 42 U.S.C. § 602(a)(22), as implemented.

786 F.2d at 1391 (emphasis added). The circuit court adopted the Secretary's interpretation, holding that the initiation of the ineligibility period could not be delayed until after notice of termination and resolution of any appeal. The court said, "The overpayments to ineligible recipients are recouped like any other overpayments . . . ." *Id.* at 1392.[7]

A year later, in *Turner v. McMahon*, the Ninth Circuit again considered a case involving the recoupment of AFDC over-

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[7] *Medberry* illustrates that overpayment and termination are distinct concepts. An overpayment may occur without a notice of termination ever being issued. In the lump-sum context, this could occur if, *e.g.*, the lump-sum payment is not reported to the agency until the ineligibility period is completed or there is agency delay in terminating benefits.

payments, this time based on a different eligibility statute. Over the state's objection, the state had been required to make AFDC payments to the plaintiff recipients under court injunction. That injunction was later overturned by this Court in *Heckler v. Turner*, 470 U.S. 184 (1985). The state then proposed (at the Secretary's direction) to recoup as overpayments the erroneous payments made pursuant to the earlier, overturned court order. The recipients sought to enjoin the recoupment, claiming that payments made pursuant to court order were not overpayments. The district court enjoined the recoupment, but the Ninth Circuit reversed, based upon the plain language of the federal overpayment statute and regulations:

> The record shows that the State made AFDC payment to appellees during the period of the permanent injunction which exceeded the amount the appellees were entitled to receive under the AFDC program. The statute does not distinguish overpayments made as the result of a court order.

830 F.2d at 1007-08.

Both *Medberry* and *Turner v. McMahon* are contrary to the Eleventh Circuit decision in this case. In *Medberry*, the Ninth Circuit held that a recipient *is ineligible* during the period prescribed by federal law, without regard for any delays in terminating benefits. In *Turner v. McMahon*, payments which exceeded the amounts to which the recipients were entitled under the eligibility statutes were subject to recovery as overpayments, even though they were paid pursuant to court order. Obviously, the state had not issued termination notices before making the court-ordered payments. Those cases stand for the simple proposition that an overpayment (or underpayment) is

judged merely by comparing the amount the recipient was paid with the amount the recipient was entitled to receive under the eligibility statutes and rules.

In a 1988 case arising from Minnesota, *Gardebring v. Jenkins*, 485 U.S. 415 (1988), this Court accepted review of an issue essentially identical to the issue presented here. In that case, the Eighth Circuit had ruled that Minnesota failed to give adequate advance notice of the lump-sum rule to AFDC recipients. The state sought to recoup benefits paid to one of the recipients during the period while she unsuccessfully appealed the termination of her benefits. The circuit court said that the state's recoupment should be enjoined:

> [T]he payments to Jenkins cannot be considered an overpayment, because the defendant, having failed to provide adequate notice to Jenkins of the lump-sum rule, cannot properly invoke it against her. By failing to comply with the notice regulations, [the State] failed to institute a legal change in its eligibility rules.

Slaughter v. Levine, 801 F.2d 288, 301-02 (8th Cir. 1986).

This Court granted certiorari in *Gardebring* to consider two questions: first, whether the state had failed to provide notice required by federal regulations and, second, even if the state had not provided required notice, whether the state was precluded from recouping payments made during Jenkins' period of ineligibility. 108 S.Ct. at 1308. The majority of the Court held that the state's notice procedure did not violate federal law. Consequently, the majority did not reach the overpayment issue. *Id.*

Three justices of this Court, however, did reach the overpayment issue. Justice O'Connor wrote a concurring/dissenting opinion in which Justices Brennan and Marshall joined.

Justice O'Connor concluded that the state's advance notice was not adequate under the federal regulations, but that the state must nevertheless recoup the amounts paid to Jenkins during her period of ineligibility:

> Whether or not Jenkins received notice in accord with the Secretary's regulation, therefore, the lump-sum rule applied to her when her husband received the retroactive disability payment in 1983. The Department was accordingly required by federal law to recoup the overpayments that she received during her appeal of the Department's decision to apply the new lump-sum rule in her case.

485 U.S. at 438 (O'Connor, J., concurring in part and dissenting in part). The clear point of Justice O'Connor's opinion is that the existence of an overpayment is determined by whether the recipient received an amount greater than the recipient's entitlement under eligibility statutes and rules, and not by whether a state gave adequate notice.

At least since 1986, when *Slaughter* and *Medberry* were decided by the Eighth and Ninth Circuits, a state's obligation and authority to recover overpayments in situations where the state has not provided adequate notice or has failed to promptly terminate benefits has been in a state of confusion. The Eleventh Circuit decision in this case only adds to that confusion, because it is inconsistent with the Ninth Circuit decisions in *Medberry* and *Turner v. McMahon*, as well as the concurring decision in *Gardebring*.

Amicus State of California currently has a case awaiting decision in the Ninth Circuit Court of Appeals which would be directly impacted by the decision in this case. The case is *Rosas, et al. v. Linda McMahon, Director of the California Department of Social Services v. Louis Sullivan, Secretary of*

HHS, Nos. 89-15443, 89-15525 and 89-15442. *Rosas* deals with two extremely complicated changes made in the AFDC law by Congress in the Deficit Reduction Act of 1984 ("DEFRA"), Pub. L. No. 98-269, 98 Stat. 494 (1984). It took the state and its counties several months to promulgate necessary regulations, train eligibility workers and gather necessary facts from recipient families to implement the new provisions. As a result, several months after the effective date of the DEFRA changes, many families affected by the new laws received notices that their grants were being terminated or reduced as a result of the new laws *and* that they had received overpayments in the past. The *Rosas* plaintiffs argued that the state could not recover excess benefit payments for periods before the state gave notices of benefit reduction or termination. The district court agreed with plaintiffs that advance notice was required, but held nonetheless that the payments were overpayments which could be recouped. Both sides appealed. The plaintiffs, citing the Eleventh Circuit decision in this case, argued that no law change can be effective until after the recipient receives notice of the change and that, consequently, there were no overpayments.

This Court has already accepted this issue once, in *Gardebring*, but the issue was not addressed because the case was decided on other grounds. The instant case squarely presents the issue and would result in a definitive resolution of the issue by this Court. Consequently, the state *amici* request that this Court accept review of the case to resolve the conflicting decisions of the circuit courts as well as the conflict between the Eleventh Circuit's decision and the view already expressed by three justices of this Court.

II. THE ELEVENTH CIRCUIT'S DECISION IS CLEARLY CONTRARY TO FEDERAL LAW AND RAISES IMPORTANT QUESTIONS WHICH THIS COURT SHOULD ADDRESS.

The above discussion of the conflict which exists among the federal courts concerning the issue raised by this case also shows that the Eleventh Circuit's decision incorrectly interprets federal law. There are, however, additional reasons why the lower court decision is wrong and why it raises an important question of federal law which this Court should address.

The court of appeals here held that the state should be enjoined from recovering overpayments from recipients because the state *erred* in failing to provide adequate pretermination notice to recipients. However, overpayments must be corrected whether they are a result of recipient error or agency error. This was specifically noted by the Secretary in rulemaking proceedings concerning the federal overpayment regulation:

> Comment: One commentator suggested that we should not require states to recover overpayments that result from administrative errors.
>
> Response: We do not believe that the statute permits exceptions to recovery nor does it differentiate based on the source of error. . . .

47 Fed. Reg. 5,648, 5,672 (1982).

The *amici* states are particularly concerned about the Eleventh Circuit decision because the court's reasoning could apply, not only to payments made after inadequate termination notices, but to most overpayments. Overpayments occur

for a variety of reasons, ranging from administrative errors to recipients failing to report changed circumstances. The states and their local agencies make millions of AFDC eligibility and benefit determinations each month based on the individual circumstances of families and the application of a multitude of complex federal and state statutes and regulations. In a program of this size, implemented ultimately by local caseworkers based upon information provided by recipients, many errors (both overpayments and underpayments) are bound to occur.[8] Where an overpayment or underpayment is the result of a mistake, the agency will obviously not precede the payment with a notice that an overpayment or underpayment is being made. Yet, the Eleventh Circuit's decision would preclude the recovery of such overpayments because prior notice had not been given that benefits would be reduced or terminated. The decision would thus prevent the correction of administrative or recipient errors.

The federal overpayment statute requires correction of both overpayments and underpayments. *See* 42 U.S.C. § 602(a)(22). The policy of the AFDC program operates to insure that eligible recipients are paid the correct amount of their

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[8] Precise figures on the number or dollar amount of AFDC overpayments throughout the country are unavailable. However, in enacting OBRA, Congress estimated that, over a sample six-month period, 23.5% of AFDC cases (or almost 800,000 cases nationwide) involved erroneous payments—90% of which were overpayments rather than underpayments. Congress projected a savings to the federal government of $115 million in 1982 from correcting such overpayments and underpayments. S. Rep. No. 139, 97th Cong., 1st Sess. 519, reprinted in 1981 U.S. Code Cong. & Ad. News 396, 785. This is not the total overpayment figure, since it is *reduced* by an estimate of underpayments corrected. More importantly, the $115 million is only the federal government's share (approximately one-half) of AFDC payments. The states' share would double the amount.

eligibility entitlements. *Jacquet v. Westerfield*, 569 F.2d 1339, 1344 (5th Cir. 1978); *cf. Foggs v. Block*, 722 F.2d 933, 941 (1st Cir. 1983), *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985). Because welfare funds are limited, failure to recoup overpayments will eventually diminish funds available for distribution to all welfare recipients. *Johnson v. Likins*, 568 F.2d 79, 85 (8th Cir. 1977). Moreover, failure to recover overpayments " 'would give overpayment recipients an unfair windfall when compared with other recipients'." *Id.* (quoting *Steere v. State Dep't of Pub. Welfare*, 243 N.W.2d 112, 126 (Minn. 1976)).

The circuit court's decision produces such a "windfall" result. The lump-sum statute was enacted because Congress wanted recipients to use their lump-sum income, instead of AFDC, to support themselves. *See* S. Rep. No. 139, 97th Cong. 1st Sess. 754, reprinted in 1981 U.S. Code Cong. & Ad. News 396, 771. Under the circuit court's decision, some recipients are allowed to have the full use of their lump-sum payments and receive AFDC benefits for the same periods, a result exactly contrary to Congress' purpose.

The lower court's decision also negates Congress' determination of when the lump-sum statute was to take effect. In enacting OBRA in 1981, Congress intended to alter federal fiscal policies and to restrain federal spending "in order to wage an effective battle against the high inflation and unemployment which [had] plagued the national economy for many years." S. Rep. No. 139, 97th Cong., 1st Sess. 3, reprinted in 1981 U.S. Code Cong. & Ad. News 396, 398. In furtherance of this goal, OBRA substantially amended the AFDC statute in order to tighten eligibility requirements and reduce program expenditures. To achieve the intended cost savings, Congress mandated that the changes be implemented promptly—by

October 1, 1981 or after the next legislative session if state statutory changes were required. Pub. L. No. 97-35, § 2321, 95 Stat. 357, 859-60 (1982).

Under the circuit court's decision, the lump-sum statute did not become fully effective in Georgia in 1981 as directed by Congress. Instead, as to persons who elected to receive AFDC benefits pending their administrative appeals, the statute became effective several years later when the federal court finally determined what notice of termination would be adequate. *See* Pet. App. A20, A40. The circuit court held that, "[b]ecause the state did not terminate the recipients in accordance with federal notice requirements, the recipients entitlement to aid was not affected." Pet. App. A7. Thus, the court of appeals nullified the effective date specified by Congress. This fact was clearly recognized in the concurring/dissenting opinion in *Gardebring*: "Congress gave no indication whatsoever that the effective date for the new lump-sum rule could be delayed by the action or inaction of state agencies." *Id.*, 485 U.S. at 438. Indeed, if states could delay the effect of federal benefit cuts by giving inadequate notices, "[s]tate agencies might even find this an attractive possibility, inasmuch as it would have the net effect of temporarily protecting the state's recipients from the effect of statutory benefit reductions." *Foggs v. Block*, 722 F.2d 933, 941 (1st Cir. 1983); *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985).

The court of appeals' decision cannot be justified on a theory of equitable estoppel or any similar theory. The obligation of the courts to apply the laws as written by Congress, even despite agency error, is clear. The courts may not require that public benefits be paid contrary to the statutory conditions governing those benefits. *Office of Personnel Manage-*

ment v. Richmond, ___ U.S. ___, 110 S.Ct. 2465 (1990); *see also Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) ("A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (it is the "duty of all courts to observe the conditions defined by Congress for charging the public treasury.").

It is significant that neither the statutes nor the Secretary's regulations provide, as a remedy for a state's failure to provide adequate termination notice, that the eligibility requirements will not be applied according to their clear terms. "[J]udicial use of equitable estoppel cannot grant . . . a money remedy Congress has not authorized." *Office of Personnel Management*, 110 S.Ct. at 2472. Moreover, the federal agency has "the primary responsibility for fashioning the appropriate remedy for violation of its regulations." *United States v. Caceres*, 440 U.S. 741, 756 (1979). Not only has the Secretary not promulgated a rule relieving recipients of eligibility requirements in cases of agency errors, the Secretary has done just the opposite. The Secretary has required that all overpayments and underpayments be corrected, regardless of the source of the error, so that to the extent possible each recipient receives exactly the amount to which he or she is entitled under federal law.

The implications of the circuit court's holding, that the state cannot legally effectuate a congressionally mandated eligibility requirement by recovering overpayments if it has failed to give recipients adequate notice, are enormous. Those far-reaching effects are well illustrated by this case. Respondents, attempting to defeat or postpone Congress' 1981 changes, attacked the adequacy of the state's pre-implementa-

tion and pre-termination notices. Six years after the implementation by the state, the federal court held that the state's notice was inadequate and therefore retroactively held that the lump-sum amendment was not fully effective in Georgia on the date prescribed by Congress. Recipients may thus turn the notice issue into a weapon for delaying or defeating the implementation of countless legislative judgments about AFDC eligibility. If the court of appeals' order is allowed to stand, it will seriously disrupt the ability of states to implement changes in federal law in a timely, predictable and final manner, as well as the ability of Congress to dictate when and on what conditions changes are to be made. It will directly impact federal and state treasuries by requiring that public AFDC moneys may not be recovered from recipients, even where the recipients were ineligible for the benefits under federal law.

CONCLUSION

The question presented here is important both to the states and to the administration of federal-state public assistance programs. The lower court's decision conflicts in principle with the decisions of another circuit, with the opinion of three justices of this court and with the views expressed by the Secretary in other litigation. For these reasons, the *amici* states respectfully request that the petition for a writ of certiorari be granted to consider the overpayment issue.

Dated: November, 1990.

Respectfully submitted,

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